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Supreme Court, U.S.
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No. 02-1520

IN THE

Supreme Court of the United States

CHARLES H. BEHLEN *et al.*,

Petitioner,

v.

MERRILL LYNCH & CO., INC., and
PHOENIX INVESTMENT PARTNERS, LTD. *et al.*,

Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I. The Ninth Circuit's Decision in *Falkowski* Is in Conflict with the Eleventh Circuit's Decision in the Present Case.

Respondents Merrill Lynch and Phoenix Investment Partners (collectively "Merrill Lynch") contend that *Falkowski v. Imation Corp.*, 309 F.3d 1123 (9th Cir. 2002), *opinion amended*, 320 F.3d 905 (9th Cir. 2003), is not in conflict with the Eleventh Circuit's decision below because, they contend, the nature of the claims are different in *Falkowski*. Of course some factual distinctions can be made between the cases, but the nature of the claims that the Ninth Circuit found it error to dismiss and that the Eleventh Circuit found were due to be dismissed were both "garden variety state law claims . . . not preempted by federal securities laws." *Falkowski*, 309 F.3d at 1131.

The Eleventh Circuit opinion noted that "Behlen amended the complaint to remove any federal cause of action" and that Behlen removed "the allegations that would bring his claims within the scope of the SLUSA . . . ." *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1095 (11th Cir. 2002) (Pet. App. at A16-A17). The Eleventh Circuit then looked behind the allegations of Behlen's amended complaint — the allegations that "removed all explicit references to any fraudulent activity by the defendants"[1] and that "remove[d]

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[1] *Behlen*, 309 F.3d at 1090 (Pet. App. at A3).

any federal cause of action"[2] — to conclude, erroneously, that the amended complaint "still presents a federal question"[3] and "fell within the scope of the SLUSA."[4] Some of the allegations of Behlen's complaint are described and quoted in his Petition from the bottom of page 5 to the top of page 7. The "garden variety" state-law claims asserted by Behlen, such as breach of contract (as in *Falkowski*), unjust enrichment, and negligence, among others, may, as a matter of law, be proven without any proof of or reference to any "untrue statement or omission of a material fact" or "any manipulative or deceptive device or contrivance." 15 U.S.C. § 77p(b). These claims are, therefore, outside the scope of SLUSA.

Merrill Lynch contends that Behlen "seeks only fact-bound error correction," but the errors are significant legal errors concerning whether, contrary to the treatment of the non-fraud[5] state-law claims in *Falkowski*, SLUSA completely or "super" preempts Behlen's state-law class claims that, as a matter of law, may be proven without reference to any misrepresentations or suppressions of material fact and are thus outside the scope of 15 U.S.C. § 77p(b).

Thus, there exists a significant conflict between the Ninth Circuit and the Eleventh Circuit concerning treatment of "garden variety" state-law class claims alleged that are outside the parameters of 15 U.S.C. § 77p(b).

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[2] *Behlen*, 309 F.3d at 1095 (Pet. App. at A16).

[3] *Behlen*, 309 F.3d at 1095 (Pet. App. at A17).

[4] *Behlen*, 309 F.3d at 1096 (Pet. App. at A17).

[5] The term "fraud" in this context is meant to be a shorthand reference to any of the types of allegations encompassed by 15 U.S.C. § 77p(b)(1) & (b)(2).

II. The Eleventh Circuit Erroneously Concluded That There Was General Federal-Question Jurisdiction over Behlen's Complaint for Removal Purposes.

Merrill Lynch asserts that there is "no basis" to conclude that the Eleventh Circuit found that there was general federal-question jurisdiction over Behlen's complaint for removal purposes (Merrill Lynch Br. at 16), but there is actually very little reason to conclude that the decision below relied on SLUSA's removal provision, 15 U.S.C. § 77p(c). While it is true that the Eleventh Circuit does not cite to 28 U.S.C. § 1441, this must be what is contemplated by the references to "federal question jurisdiction" to uphold the removal. As noted, there is no mention of the express prohibition on removal in § 77v and no discussion of how § 77p(c) is exempted by the removal prohibition. The only reference to § 77p(c) is in footnote 3 of the opinion where the court is discussing the background of SLUSA and explaining what was added by SLUSA to the Securities Act of 1933.[6] The opinion contains no substantive discussion of § 77p(c) or any application of it to this case.

Significantly, the court stated that "[i]n the instant case, the district court had *federal question jurisdiction* over Behlen's original complaint, because the claims therein were preempted by SLUSA," and stated further that "the amended complaint still presents a *federal question*." *Behlen*, 311 F.3d at 1095 (Pet. App. at A16-A17) (emphasis added). These statements – combined with the court's discussion of the "complete pre-emption doctrine"[7] and the court's reporting that "the defendants removed the case to the

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[6] *Behlen*, 311 F.3d at 1091-92 & n.3 (Pet. App. at A8).

[7] *Behlen*, 311 F.3d at 1090 (Pet. App. at A5) (citing and quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987)).

district court based upon their belief that Behlen *actually alleged violations of federal securities laws*"[8] – indicate a reliance on general federal-question jurisdiction for the removal rather than § 77p(c).[9] Certainly, it could not be argued that removal jurisdiction for a federal question is established by § 77p(c).

As argued in the Petition, to conclude that removal was available under 28 U.S.C. § 1441 is erroneous – especially in light of 15 U.S.C. § 77v, which was not discussed by the Eleventh Circuit – unless something in 15 U.S.C. § 77p(b) presents a federal question and triggers removal authority. The Petition discussed whether the phrase "be maintained" could imply removal jurisdiction and discussed the then-pending case of *Breuer v. Jim's Concrete of Brevard, Inc.*, which was subsequently decided on May 19, 2003. *Breuer v. Jim's Concrete of Brevard, Inc.*, 123 S. Ct. 1882 (2003). In *Breuer* the Court noted that the "may be maintained" language of the Fair Labor Standards Act ("FLSA") was ambiguous as to "its bearing on removal" and concluded that it did not indicate a bar to removal. *Id.*, at 1884, 1886. The Court did observe that use of the word "maintain" may mean more then "to 'commence' an action" and noted that in the context of the FLSA probably meant "'to continue' to litigate" rather than to "'commence' an action." *Id.* at 1884 & n.1. In the context of 15 U.S.C. § 77p(b), which relates to class actions, the word "maintain" seems to mean more than commencing of an action, given the context of class actions

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[8] *Behlen*, 311 F.3d at 1090 (Pet. App. at A4) (emphasis added).

[9] Additionally, the Defendants' Notice of Removal filed in the district court provided in the opening paragraph that it was filed "pursuant to 28 U.S.C. § 1441(b) and 1446, *et seq.*," – not 15 U.S.C. § 77p(c).

and the use of the word "maintained" in Rule 23 of the Federal Rules of Civil Procedure. *See, e.g.*, Fed. R. Civ. P. 23(b) ("An action may *be maintained* as a class action if the prerequisites of subdivision (a) are satisfied . . .") (emphasis added); Fed. R. Civ. P. 23(c)(1) ("As soon as practicable after the commencement of an action brought as a class action, the court shall determine whether it is to be so *maintained*.") (emphasis added). In any event, in the abstract, the use of the word "maintained" in § 77p(b) carries no particular implication about removal.[10]

The error in characterization of the underlying issue — as inherently federal — bears on the major omission of the Eleventh Circuit's opinion of the SLUSA provision which is the text that provides for removal. By treating the state-court action as one which asserts violations of the federal securities laws, the panel avoids the need to discuss the text of subsection (c) of 15 U.S.C. § 77p, the provision which describes the conditions for removal. Federal-court jurisdiction over this case should be resolved by explicitly addressing the text of § 77p(c), considered in light of the text of the Complaint, in accord with the principles of the decision in *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 122 S. Ct. 1889 (2002).

Also troubling is the provision in 15 U.S.C. § 77v(a) which provides that "[e]xcept as provided in section 77p(c) . . ., no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." In light of this provision,

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[10] Even if the Eleventh Circuit did rely on 15 U.S.C. § 77p(c), and Petitioner does not believe the opinion can be fairly read to do so, the use of the word "maintained" in § 77p(b) is still relevant, because § 77p(c) only makes removable a covered class action "as set forth in subsection (b)."

there is no ground to remove the action without referencing § 77p(c). It therefore seems critical to resolve Behlen's appeal on the basis of § 77p(c), and its explicit text, rather than the complete-preemption doctrine perceived to be implicit in § 77p(b), especially since any doubts regarding removal should be resolved in favor of the Plaintiffs and against removal.

In addition, 15 U.S.C. § 77v highlights the difficulty of grounding the expansive interpretation of SLUSA on the legislative history's concern with the migration of class-action claims into state court. This statute mandates that class actions which allege federal securities law violations (in contrast to state-law violations), if brought in state court, be left there. The mere presence in state court of class allegations was not the problem. Furthermore, there is no SLUSA "removal protection" from the state court allowing class-wide discovery on a federal securities-law class claim.

One might assume that the state court will require, on proper motion, particularized pleading of such a federal securities claim under the Private Securities Litigation and Reform Act ("PSLRA"). However, that same assumption would justify the plain reading of SLUSA that prevents removal or dismissal until the state court has determined that the state action is due to be maintained as a class action. Because SLUSA did not repeal 15 U.S.C. § 77v, there is doubt that SLUSA's text must be construed or implied to authorize removal and dismissal of mere allegations of class-wide wrongdoing based on state law, despite any explicit textual direction to do so. Drawing the inference from the SLUSA language, so as to prevent the possibility that discovery related to class allegations might occur in the state court, is implausible. Plaintiff may choose not to even seek certification of any "SLUSA-type" claim.

A better reading of SLUSA's text is not to assume that the state courts will fail to administer the uniform standards

of SLUSA properly, and not to assume that removal and dismissal are required for mere allegation of class-wide wrongdoing. To base the construction of SLUSA's text on the mere possibility of discovery related to a state-law claim of class-wide wrongdoing assumes purposes to the PSLRA that are not present. Section 101(b) of the PSLRA itself does not bar all discovery.

Considered in this light, the Eleventh Circuit erred in concluding that general federal-question jurisdiction for purposes of removal existed with regard to Behlen's complaint, and Merrill Lynch is incorrect in asserting that there is no basis to conclude that general federal-question jurisdiction was found by the Eleventh Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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